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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2012-018066 08/04/2014

HONORABLE PATRICIA ANN STARR

CLERK OF THE COURT
S. Brown
Deputy

JEFFREY LIPSKY KEVIN B. WEIN

v.

SAFETY NATIONAL CASUALTY CORP, et al. KELLY HEDBERG

MELANIE V PATE
DEANNE AYERS

UNDER ADVISEMENT RULING

On July 11, 2014, this Court heard oral argument on Defendant CSK Auto, Inc., n/k/a O'Reilly Auto Enterprises, LLC d/b/a O'Reilly Auto Parts ("O'Reilly")'s Motion for Summary Judgment and Defendant Safety National Casualty Corp. ("Safety"), Gallagher Bassett Services ("Gallagher"), and Sandy Powell ("Powell")'s Motion for Summary Judgment. After argument, the Court took both matters under advisement.

The Court has considered all the related papers and pleadings as well as the arguments of the parties.

Summary Judgment Standard

A court may enter summary judgment only if "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Rule 56(a), Ariz. R. Civ. P. See also *Delmastro & Eells v. Taco Bell Corp*, 228 Ariz. 134, 137-38, ¶ 7, 263 P. 3d 683, 686-87 (App. 2011). In other words, a motion for summary judgment should be granted "if the facts produced in support of the claim or defense have so little probative value, given the

quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

In deciding a motion for summary judgment, the Court must view the facts and the reasonable inferences to be drawn from those facts in the light most favorable to the non-moving party. See, e.g., *Espinoza v. Schulenburg*, 212 Ariz. 215, 216, ¶ 6, 129 P.3d 937, 938 (2006).

"[W]here the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper." *National Bank of Arizona v. Thurston*, 218 Ariz. 112, 116, ¶ 17, 180 P.3d 977, 981 (App. 2008), quoting *United Bank of Arizona v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990).

O'Reilly's Motion for Summary Judgment

O'Reilly seeks summary judgment against Lipsky, arguing that Lipsky cannot show wrongful termination because he continued to work for nearly two months after his workers' compensation claim was filed, and he was appropriately terminated pursuant to a neutral attendance policy.

Lipsky counters that because O'Reilly created a policy that directly targets employees who dispute and litigate workers compensation claims, summary judgment should be denied.

The parties agree that on November 6, 2011, Lipsky began work for O'Reilly. On December 31, 2011, Lipsky sustained an injury at work. On February 23, 2012, Gallagher and Bassett determined that Lipsky's lower back pain resulted from his on the job injury, but that his upper back and neck pain did not. On March 2, 2012, O'Reilly's Leave of Absence Coordinator, Chris Cummings, advised Lipsky by phone that leave over 14 days would not be authorized; Ms. Cummings sent Lipsky a letter via overnight mail, informing him that he was not eligible for extended leave, and that his employment would be terminated if he did not return to work by March 8, 2012. On March 8, 2012, O'Reilly terminated Lipsky's employment.

In October of 2012, the Industrial Commission of Arizona ("ICA") found that Lipsky's neck injury was related to his on the job injury and was compensable.

Both parties agree that to prevail on his claim of unlawful termination, Lipsky must show that his filing of a workers' compensation claim was a substantial factor in O'Reilly's decision to terminate his employment. See, e.g., *Thompson v. Better-Bilt Aluminum Prod. Co.*, 187 Ariz. 121, 127, 927 P.2d 781, 787 (App. 1996).

O'Reilly's attendance policy permits an employee to be absent from work for an excused reason for up to 14 consecutive days, after that time period, the worker will be terminated unless additional leave is authorized through another O'Reilly policy or applicable law.

Because Lipsky had been working for O'Reilly for less than six months, he did not qualify for a personal leave of absence or for leave under the Family Medical Leave Act. And because Gallagher Bassett denied Lipsky's claim that his neck injury was related to his on the job injury, Lipsky was not authorized to take a leave of absence in connection with treatment of a work-related injury, pursuant to O'Reilly's policy.

The facts of this case distinguish it from *Douglas v. Wilson*, 160 Ariz. 566, 774 P.2d 1356 (App. 1989), cited by Lipsky in support of his argument that O'Reilly terminated him in retaliation for his filing of a workers' compensation claim. In *Douglas*, the plaintiff never returned to work after her injury, was never offered light-duty work, was given a deadline that she had no opportunity to meet, and was terminated because of "unspecified . . . 'feedback' on her job performance . . ." *Id.* at 569, 774 P.2d at 1359.

Here, the evidence is undisputed that Lipsky returned to work after his injury, worked on modified duty, and was given a satisfactory job review.

Moreover, while the ICA ultimately found Lipsky's neck injury compensable because it occurred on the job, at the time of his termination, O'Reilly's insurance carrier had determined that the neck injury was non-compensable.

Lipsky argues that O'Reilly adopted a policy to terminate employees who litigated workers' compensation claims. Even taking the facts in a light most favorable to Lipsky, the evidence in the record simply does not support that claim.

For the foregoing reasons,

IT IS ORDERED granting Defendant O'Reilly's Motion for Summary Judgment.

IT IS FURTHER ORDERED that O'Reilly submit a form of order and any request for fees and costs within thirty days.

Gallagher, Safety and Powell's Motion for Summary Judgment

Defendants seek dismissal of Lipsky's claims of bad faith and aiding abetting based on Defendants' alleged wrongful handling of Lipsky's worker's compensation claim. Defendants argue that they had a reasonable basis for their conduct, and thus cannot be held liable for breach of the duty of good faith and fair dealing or aiding and abetting. Defendant's Powell and Gallagher further argue that they cannot be held liable for aiding and abetting as a matter of law, because they cannot aid and abet themselves. Defendants further argue that Lipsky cannot establish damages, which is an essential element of his claims. Finally, Defendants argue that Lipsky cannot establish his entitlement to punitive damages.

Lipsky counters that Safety's outright refusal to accept his claim constitutes bad faith, and that Gallagher Bassett and Powell aided and abetted that bad faith.

"The tort of bad faith only arises when an insurance company intentionally denies or fails to process or pay a claim without a reasonable basis for such action." *Lasma Corp. v. Monarch Ins. Co. of Ohio*, 159 Ariz. 59, 63, 764 P.2d 1118, 1122 (1988), citing *Rawlings v. Apodaca*, 151 Ariz. 149, 156, 726 P.2d 565, 572 (1986).

The question is whether there is sufficient evidence from which reasonable jurors could conclude that when investigating, evaluating and processing Lipsky's claim, Defendants acted unreasonably, and either knew or were conscious of the fact that their conduct was unreasonable. *Zillisch v. State Farm Mutual Auto Ins. Co.*, 196 Ariz. 234, 238, ¶ 22, 995 P.2d 276, 280 (2000).

Here, Dr. McLean opined that the on the job injury at O'Reilly resulted in Lipsky's neck injury and need for surgery, and that the injury was not attributable to Lipsky's earlier injury or surgery. Dr. Beghin agreed with Dr. McLean's diagnosis but suggested the earlier surgery played a contributing role to the current injury by predisposing Lipsky to that injury. Lipsky later moved to reopen his claim regarding the prior injury. Given these facts, the insurance carrier had a reasonable basis to dispute Lipsky's claim.

Even taken in a light most favorable to Lipsky, no evidence of bad faith in investigating and denying part of Lipsky's claim exists in this record. Nor is there evidence supporting Lipsky's claim that the insurance carrier intentionally failed to pay him benefits in a timely manner.

Because there is no evidence of bad faith on the part of Safety, Gallagher and Powell cannot be held liable for aiding and abetting.

For the foregoing reasons,

IT IS ORDERED granting Safety, Gallagher and Powell's Motion for Summary Judgment.

IT IS FURTHER ORDERED that Safety, Gallagher and Powell submit a form of order and any request for fees and costs within thirty days.